In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 819

MAGNESIUM CASTING COMPANY, PETITIONER

v.

ALBERT J. HOBAN, REGIONAL DIRECTOR OF THE FIRST REGION OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 11–14) is reported at 401 F. 2d 516. The opinion of the district court (Pet. 15–18) is unreported. The underlying Decision and Direction of Election of the Regional Director of the National Labor Relations Board (Pet. 19–27) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1968 (Pet. 11, 14). The petition for a writ of certiorari was filed on December 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

329-985—69

QUESTION PRESENTED

Whether the employer waived his right to challenge the validity of the Board's *Excelsior* rule (156 NLRB 1236), which requires an employer to furnish the names and addresses of its employees eligible to vote in a Board election, when it supplied the required list to the Board, without objection, upon demand.

STATUTES INVOLVED

Section 9(c) of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 159(c)), in relevant part, reads as follows:

> (1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
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> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
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> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);
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> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists

shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT

On March 14, 1968, the United Steelworkers of America, AFL–CIO, filed a petition with the Board for an election among the production and maintenance employees of the Magnesium Casting Company's Boston, Massachusetts, plant. On May 22, the National Labor Relations Board's Regional Director issued a decision (Pet. 19–27) directing that an election be held (the date was later fixed at June 21) and requiring the Company to file a list containing the names and addresses of all eligible voters with the Regional Director within seven days, which list would then be made available to all parties to the election; he stated that a failure to comply with this requirement would be grounds for setting aside the election if a proper objection were filed (Pet. 26, n.3). This requirement was imposed in accordance with the Board's decision in *Excelsior Underwear Inc.*, 156 NLRB 1236. On May 29, the Company supplied the *Excelsior* list without objection (Pet. 12).

On June 12, 1968, the United States Court of Appeals for the First Circuit announced its decision in *Wyman-Gordon Co.* v. *National Labor Relations*

Board, 397 F. 2d 394, certiorari granted, November 12, 1968, No. 463, this Term, holding that the *Excelsior* rule was invalidly promulgated. On June 17, the Company filed a Motion to Withdraw Decision and Direction of Election and Dismiss Petition, on the ground that the Company had been compelled to furnish the Union with assistance which *Wyman-Gordon* had established could not legally be required (Pet. 28–29). On June 19, the Regional Director denied the motion; the Board thereafter denied the Company's request for special permission to appeal (Pet. 30, 33). The election was held as scheduled and the Union won, 140 to 59, with 1 challenged ballot (Pet. 16).

On July 12, the Company brought an action in the United States District Court for the District of Massachusetts to enjoin the Regional Director and the Board from certifying the results of the election. The Board moved to dismiss the complaint on the grounds that the district court lacked jurisdiction over the subject matter of the action and that the Company had failed to exhaust its administrative remedies. The court found that the Board had exceeded its statutory authority in requiring the Company to furnish the *Excelsior* list and enjoined it from certifying the results of the election pending final disposition by this Court of the petition for certiorari which the Board had meanwhile filed in *Wyman-Gordon* (Pet. App. 15–18).

On appeal by the Board, the court of appeals summarily reversed. The court of appeals held (Pet. 13):

"There is no merit in the contention that the election was unlawful. The fact that the Board improperly ordered [the Company] to supply certain factual information was not jurisdictional so far as the election itself was concerned, but merely collateral thereto." Accordingly, it concluded (*ibid.*) that here, as in *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, the Company had waived its objection by failing to assert it in timely fashion.

ARGUMENT

As shown in the Statement, the Company voluntarily complied with the *Excelsior* requirement and then, when the First Circuit ruled in *Wyman-Gordon* that the *Excelsior* requirement was invalidly promulgated, sought to take advantage of that ruling by claiming that the information it previously furnished without question had tainted the subsequent election. But, as the court below properly concluded, "[The Company] could not use its own compliance, afterwards regretted, as a basis for stopping all proceedings" (Pet. 13). Under well settled principles, an objection not timely pressed before the administrative agency may not be raised belatedly before the courts. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37–38; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492. As the court below noted (Pet. 12), the Company's "recourse, if the *Excelsior* rule was invalid, was to refuse to comply and to allow the election to proceed in an otherwise orderly fashion if the Board and the union were so minded."

Then, if the Union won the election, the Company's bargaining obligation could still be fixed; and, if the Union lost the election, the Board could set it aside and institute judicial proceedings to secure the list, in which the Company's arguments against the *Excelsior* rule could have been raised.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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